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No. 00-1666

IN THE

Supreme Court of the United States

In the Matter of: THE GINTHER TRUSTS,
A Texas Joint Venture

FERGUS M. GINTHER,

Petitioner,

v.

THE GINTHER TRUSTS, A Texas Joint Venture;
and REDSTONE EL DORADO ACQUISITION, L.P.,

Respondents.

ON PETITION FOR A WRIT OF CERTIORARI TO THE
UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

BRIEF IN OPPOSITION FOR RESPONDENT REDSTONE EL DORADO ACQUISITION, L.P.

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QUESTION PRESENTED

Despite Petitioner's attempts to create jurisdictional and constitutional issues, this case involves a simple application of 11 U.S.C. § 363(m) in the context of a bankruptcy sale. The Bankruptcy Court entered a Final Judgment authorizing the sale to Respondent as a good faith purchaser, Petitioner's requests to stay the sale were denied, and the sale closed. As such, Petitioner's appeal was rendered moot. The only question presented on appeal was whether application of 11 U.S.C. § 363(m) was correct. Because the district courts and the courts of appeal have consistently applied 11 U.S.C. § 363(m) in this context to render an appeal moot, the rulings of the District Court and the Fifth Circuit were correct, and there is no unsettled or important question presented which warrants this Court's review.

PARTIES TO THE PROCEEDING AND STATEMENT PURSUANT TO RULE 29.6

The parties to the Adversary Proceeding in the Bankruptcy Court below are identified in the Final Judgment, attached as Appendix E to the Petition. (Pet. App. E, 14a-15a; 21a-23a).

Redstone Group, Ltd. is the 99% limited partner of Redstone El Dorado Acquisition, L.P. The general partner of Redstone Group, Ltd. is Redstone, Inc. a Texas corporation. There is no publicly held company that owns 10% or more of the corporation's stock.

TABLE OF CONTENTS

	Page
Question Presented	i
Parties to the Proceeding and Statement Pursuant to Rule 29.6	ii
Table of Contents	iii
Table of Cited Authorities	v
Table of Appendices	ix
Constitutional Provisions and Statutes Involved	1
Statement of the Case	1
Reasons for Denying the Writ	5
I. The Fifth Circuit Followed Established Case Law In Applying 11 U.S.C. § 363(m)	8
II. There Is No Split In The Circuits Regarding Application Of § 363(m)	9
III. Petitioner Is Not Entitled To Affect The Validity Of The Sale	14
IV. Application Of 11 U.S.C. § 363(m) Does Not Pervert The Rule In *Ruhrgas* And *Steel Co.*	16
V. Application Of 11 U.S.C. § 363(m) Does Not In Any Way Conflict With The Remedy Of Vacatur	18

Contents

Page

VI. Petitioner's Jurisdictional Arguments Are Misguided 19

VII. Equitable And Practical Considerations Further Dictate That This Appeal Is Moot ... 22

Conclusion 24

TABLE OF CITED AUTHORITIES

Page

Cases:

American Grain Association v. Lee-Vac, Ltd., 630 F.2d 245 (5th Cir. 1980) 8

Church of Scientology of California v. United States, 506 U.S. 9, 113 S. Ct. 447 (1992) 10, 13, 14

In re Ascher, 128 B.R. 639 (Bankr. N.D. Ill. 1991) 19

In re BCD Corp., 119 F.3d 852 (10th Cir. 1997) 5, 11, 12, 13, 14

In re Bleaufontaine, Inc., 634 F.2d 1383 (5th Cir. 1981) 8, 9

In re CGI Industries, Inc., 27 F.3d 296 (7th Cir. 1994) 9, 11

In re Filtercorp, Inc., 163 F.3d 570 (9th Cir. 1998) 10, 13, 14

In re Gilchrist, 891 F.2d 559 (5th Cir. 1990) 8, 9

In re Ginther, 791 F.2d 1151 (5th Cir. 1986) 7

In re Gucci, 126 F.3d 380 (2d Cir. 1997) 9

In re Lloyd, 37 F.3d 271 (7th Cir. 1994) .. 5, 11, 12, 13, 14

In re Moody, 817 F.2d 365 (5th Cir. 1987) 20

Cited Authorities

Page

In re Onouli-Kona Land. Co., 846 F.2d 1170 (9th Cir. 1988) 9, 10, 11, 13

In re Osborn, 24 F.3d 1199 (10th Cir. 1997) 5, 11, 12, 13, 14

In re Rickel Home Centers, Inc., 209 F.3d 252 (3d Cir. 2000) 9, 10

In re Sax, 796 F.2d 994 (7th Cir. 1986) 9, 12, 20, 21

In re Stadium Management Corp., 895 F.2d 845 (1st Cir. 1990) 9, 11

Matter of Greene Hospital, 835 F.2d 589 (5th Cir. 1988), *cert. denied*, 488 U.S. 820 (1988) 20

Matter of Manges, 29 F.3d 1034 (5th Cir. 1994), *cert. denied*, 513 U.S. 1152, 115 S. Ct. 1105 (1995) ... 22

Matter of Phillips, 844 F.2d 230 (5th Cir. 1988) .. 19

Matter of Simpson, 36 F.3d 450 (5th Cir. 1994) ... 20

Mills v. Green, 159 U.S. 651, 16 S. Ct. 132 (1895) 10, 13, 14

Pittsburgh Food & Beverage v. Ranallo, 112 F.3d 645 (3d Cir. 1997) 9, 11

Ruhrgas v. Marathon Oil Co., 526 U.S. 574, 119 S. Ct. 1563 (1999) 16, 17

Cited Authorities

Page

Steel Co. v. Citizens for a Better Environment, 523 U.S. 83, 118 S. Ct. 1003 (1998) 16, 17

T&B Scottsdale Contractors, Inc. v. U.S., 866 F.2d 1372 (11th Cir. 1989), *cert. denied*, 493 U.S. 846 (1989) 20

U.S. Bancorp Mortgage Co. v. Bonner Mall Partnership, 513 U.S. 18, 115 S. Ct. 386 (1994) 18

United States v. Munsingwear, 340 U.S. 36, 71 S. Ct. 104 (1950) 18

Statutes:

11 U.S.C. § 101 1

11 U.S.C. § 101(41) 19

11 U.S.C. § 109 19

11 U.S.C. § 363 2

11 U.S.C. § 363(b) 5

11 U.S.C. § 363(h) 2

11 U.S.C. § 363(m) ..... *passim*

28 U.S.C. § 157 19

28 U.S.C. § 1334(a) 19

Cited Authorities

	Page
28 U.S.C. § 1334(b)	19
28 U.S.C. § 1334(e)	19
28 U.S.C. § 2106	18
Tex. Rev. Civ. Stat. Ann. art. 6132b-1.01 (14)	1, 22
Tex. Rev. Civ. Stat. Ann. art. 6132b-2.02	21

TABLE OF APPENDICES

Page

Appendix A — Order Of The United States Bankruptcy Court For The Southern District Of Texas, Houston Division On Motion To Dismiss Dated And Entered June 24, 1998 ..... 1a

Appendix B — Excerpts From Transcript Dated January 28, 2000; Judge Greendyke's Oral Ruling On Motion To Sell/Amended Motion To Sell/2nd Amended Motion To Sell (Transcript, Jan. 28; 230-243) 5a

CONSTITUTIONAL PROVISIONS AND STATUTES INVOLVED

In addition to the statutes cited by Petitioner:

11 U.S.C. § 101:

> Section 101. Definitions
>
> In this title —
>
> (41) "person" includes individual, partnership, and corporation, ...

Tex. Rev. Civ. Stat. Ann. art. 6132b-1.01(14):

> Article 6132b-1.01. General Definitions
>
> In this Act —
>
> (14) "Person" includes an individual, corporation, business trust, estate, trust, custodian, trustee, executor, administrator, nominee, partnership (including a registered limited liability partnership and a limited partnership), association, limited liability company, government, governmental subdivision, governmental agency, governmental instrumentality, and any other legal or commercial entity, in its own or representative capacity.

STATEMENT OF THE CASE

On March 11, 1998, The Ginther Trusts, a Texas Joint Venture ("Debtor"), filed a voluntary petition for relief under Chapter 11 of the United States Bankruptcy Code.

On March 13, 1998, certain judgment creditors filed a Motion to Dismiss and for Sanctions ("Motion to Dismiss")

asserting that there was no joint venture, that the Debtor consisted of trusts which were ineligible to file bankruptcy, and that the Debtor had no assets.

After a multi-day evidentiary hearing on the Motion to Dismiss, on June 24, 1998, the Bankruptcy Court entered its Order on the Motion to Dismiss, finding that the two grantor trusts, which held record title to a 51-53% interest in the El Dorado Ranch (hereinafter the "Ranch"), were a de facto joint venture, and further finding that the only property of the Debtor's estate was the 51-53% undivided interest in the Ranch, as well as the Debtor's interest in the El Dorado Golf Club, Inc. The Order further determined that no other property was property of the Estate.[1] No appeal was taken from that Order.

On February 1, 1999, having negotiated a Sale and Purchase Agreement to sell the Ranch, the Debtor filed a Motion for Authority to Sell Property Free and Clear of Liens and Encumbrances Pursuant to 11 U.S.C. § 363 ("Motion to Sell"). Because the Debtor only owned a 51% interest in the Ranch, the Debtor filed an Adversary Proceeding ("Adversary Proceeding") under 11 U.S.C. § 363(h) to compel sale of both the Estate's interest in the Ranch and the interests of the co-owners.

The Motion to Sell and the Adversary Proceeding were consolidated. After a two day trial on January 27, 2000 and January 28, 2000, Judge Greendyke ruled in favor of the Debtor and ordered sale of 1643.94 acres of the Ranch to Redstone El Dorado Acquisition, L.P. ("Redstone").[2] A Final Judgment approving the sale was entered on March 2, 2000, from which Petitioner appeals.[3]

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1. Resp. App. A.

2. Resp. App. B at 5a-11a.

3. Pet. App. E.

Petitioner filed motions to stay enforcement of the Final Judgment in the Bankruptcy Court, the District Court, and the Fifth Circuit. All requests were denied.[4] Relying on the finality of the sale order, Redstone and the Debtor closed the sale of the property to Redstone on March 23, 2000.

Petitioner was not originally a party to the Adversary Proceeding, as he is not a co-interest owner. He was added to the Adversary Proceeding after he filed a lis pendens in the Real Property Records claiming an interest in the Ranch due to a dispute between Petitioner and Nucorp, Inc., one of the co-interest owners. On appeal, however, Petitioner's arguments are based upon his position as a beneficiary of the two grantor trusts which, as joint venturers, make up the Debtor.[5]

By the time of the trial of the Motion to Sell and the Adversary Proceeding, all co-interest owners had either defaulted or ratified the sale.[6] Petitioner did not attend the trial. Counsel for Petitioner did not put on any witnesses. In fact, the only testimony regarding Petitioner was that he had no objection to the sale or the price. Judge Greendyke found that even Petitioner's counsel recognized that the sale of the Ranch was a positive thing to occur.[7]

Subsequent to the sale to Redstone, Redstone sold almost half of the surface estate to North Belt/767, L.P., and almost half of the mineral estate to Mesa Road Partners.

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4. Pet. App. C at 9a-10a; Pet. App. D. at 11a-12a.

5. Subsequent to entry of the Final Judgment, Petitioner apparently disputed distribution of sales proceeds to Nucorp, Inc. *See* Pet. 8 n.2; 10-11; Pet. App. G, App. H, App. I, App. J, App K. Petitioner did not raise that issue in this appeal, however, in either the District Court or Fifth Circuit below.

6. Pet. App. E at 16a-17a; 21a-23a.

7. Resp. App. B at 5a.

There are two clear factual misstatements in the Petition. Petitioner claims that during the trial "it was conceded" that the Debtor "owned no interest of record in the El Dorado Ranch."[8] In fact, the Court's June 24, 1998, Order on the Motion to Dismiss determined that the two grantor trusts, which together held record title to a 51% interest in the Ranch, were a de facto joint venture, and that the 51% interest in the Ranch was property of the Debtor's Estate.[9] Because record title was in the name of the two grantor trusts,[10] Petitioner argued at trial that the Debtor did not own any interest in the Ranch. The Bankruptcy Court found this argument disingenuous.[11]

Second, Petitioner states that: "The trustee, who did not appear in the adversary proceeding, ratified the transaction and executed the deed, but received nothing for the conveyance of the property entrusted to it."[12] This is inaccurate. Mr. James Cox, designated representative of Advent Trust Company, the trustee of each of the grantor trusts, appeared at trial and testified in support of the sale. Pursuant to the Final Judgment entered by the Bankruptcy Court, the property was sold for the sum of $10,000,000, which price was paid at closing. Pursuant to the Final Judgment, the Debtor's pro rata share of the sales proceeds, attributable to its 51% interest in the Ranch, was placed into a Debtor Net Proceeds Account, pending further Order of the Court.[13] While a check was not technically written to Advent Trust Company, as Trustee, the money went into the Debtor's Net Proceeds Account to be used by the Debtor to fund its Plan of Reorganization.

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8. Pet. at 9.

9. Resp. App. A.

10. Pet. App. E at 16a.

11. Resp. App. B at 5a-7a.

12. Pet. at 10.

13. Pet. App. E at 31a-33a.

REASONS FOR DENYING THE WRIT

The sole question presented in the appellate courts below was whether application of 11 U.S.C. § 363(m) rendered the appeal moot. Under 11 U.S.C. § 363(m), the reversal on appeal of an authorization of a sale of property under § 363(b) does not affect the validity of a sale to an entity which purchased the property in good faith. This provision has been interpreted consistently by the bankruptcy courts, the United States District Courts, and the United States Courts of Appeal as rendering moot any appeal of a sale authorized under § 363(b), to a good faith purchaser, in the absence of a stay pending appeal, once the sale actually occurs. Because Petitioner was not successful in obtaining a stay of the sale to Redstone, there was an affirmative finding of the Bankruptcy Court of Redstone's good faith, and the sale closed, both the District Court and the Fifth Circuit held that Petitioner's appeal was moot.

There is no split in the Circuits on this issue. Case law in the Circuit Courts has consistently held that application of § 363(m) renders an appeal moot once the sale closes, when there is no stay on appeal and the purchaser is in good faith. The appeal is moot because, by statute, the appellate court cannot fashion any relief which would affect the validity of the sale. The cases cited by Petitioner do not reflect a division on this issue. *In re Osborn*;[14] *In re BCD Corp.*,[15] and *In re Lloyd*,[16] merely hold that an appeal may not be moot *if the appellant seeks remedies which do not affect the validity of the sale.* For example, if the appellant claims an interest in the sales proceeds, and his interest has been denied, there may still be reason to address the merits of the appeal. This is simply an exception to the mootness doctrine. The cases are consistent in

14. 24 F.3d 1199 (10th Cir. 1997).

15. 119 F.3d 852 (10th Cir. 1997).

16. 37 F.3d 271 (7th Cir. 1994).

holding that the validity of the sale should not be disturbed on appeal.

Petitioner implies that he does not attempt to affect the validity of the sale. Before the Fifth Circuit, however, he asked the Court to dismiss the bankruptcy case of the Debtor and set aside the Final Judgment approving the sale to Redstone. Certainly to Redstone, as purchaser, and its title insurer, such relief would affect the validity of the sale. Moreover, without the Final Judgment in place, Petitioner admits that he would again challenge Redstone's status as a good faith purchaser in "another forum." He would then use this as the basis for pursuing his claim that a constructive trust should be placed on his claimed 12.86% undivided interest in the property sold.[17]

Petitioner does not need to set the Final Judgment or the sale aside to claim an interest in the sales proceeds. As a beneficiary of the two grantor trusts, he has an interest in the net proceeds of the sale which were deposited in the Debtor's Net Proceeds Account pursuant to the Final Judgment. He will eventually receive his pro rata share of these proceeds through distributions under the Plan of Reorganization, which has now been confirmed.

The truth is that Petitioner does not want the Bankruptcy Court to decide how the proceeds should be distributed. As requested relief in this appeal, he asks the Court to find that the Bankruptcy Court has no jurisdiction over the Debtor. If he is granted the relief requested, the Bankruptcy Court will not have jurisdiction over the remaining sales proceeds in the Debtor's account, leaving Petitioner, numerous creditors and family members to engage in continued litigation regarding their claimed interests in the proceeds.[18]

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17. Pet. at 16, 20-21, 28; Brief for Appellants (5th Cir.) at 12, 25-26.

18. The need for finality in this case is real. Petitioner's litigation to date includes his state court suit against Nucorp, Inc.; the post-

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Equitable and practical considerations further dictate that the Final Judgment and the sale to Redstone be affirmed, and that this appeal be declared moot. The Bankruptcy Court found, without question, that the sale of the property to Redstone was in the best interests of the Estate and all parties involved, including the co-interest owners. There were no co-interest owners who objected to the sale. The sales proceeds have all been distributed by the title company. Taxes and closing costs have been paid. Sale proceeds have been distributed to the co-interest owners and their lienholders, who are not parties to this appeal. The remaining 51% has been placed in the Debtors Net Proceeds Account, and a liquidating plan of reorganization has been confirmed in the Debtor's case. Almost half of the acreage sold to Redstone has been transferred to third parties who are not parties to this proceeding. Construction of a golf course and residential development on the property has begun. The impossibility of undoing the sale which has already occurred, and the effect it will have on all parties involved, are practical matters that deserve consideration by this Court and further dictate that the Petition for Certiorari be denied.

The Fifth Circuit's ruling was correct in all respects. There is no split amongst the Circuits regarding the proper application of 11 U.S.C. § 363(m), and Redstone urges this Honorable Court to deny the Petition for Certiorari.

(Cont'd)
judgment dispute with Charter Title Company; a separate suit filed against Advent Trust Company, the trustee of the two grantor trusts; the present appeal; and anticipated appeal of confirmation of the Debtor's Plan. Pet. at 8-9 n.2; 10-12, 14, 21. Pet. App. G, App. H, App. I, App. J, App. K. *See In re Ginther*, 791 F.2d 1151 (5th Cir. 1986).

I. THE FIFTH CIRCUIT FOLLOWED ESTABLISHED CASE LAW IN APPLYING 11 U.S.C. § 363(m)

As reflected by its opinion, the Fifth Circuit relied on application of 11 U.S.C. § 363(m) in holding that the Bankruptcy Court's authorization of the sale could not be reversed or modified once Petitioner failed to obtain a stay of the sale and the sale closed. The Fifth Circuit interprets this section to moot an appeal, in the absence of a stay, once a sale has occurred.[19] As stated in *In re Gilchrist* (5th Cir. 1990):

> Section 363(m) patently protects, from later modification on appeal, an authorized sale where the purchaser acted in good faith and the sale was not stayed pending appeal.[20]

The Fifth Circuit's holding in *In re Gilchrist* is based upon an adoption of the Seventh Circuit's interpretation of § 363(m) as set forth in the case of *In re Sax* (7th Cir. 1986).[21] As interpreted by *In re Gilchrist* and *In re Sax*, § 363(m) expresses a policy of affording finality to judgments of the bankruptcy court as well as giving finality to orders and judgments upon which third parties rely.[22]

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19. *In re Gilchrist*, 891 F.2d 559, 560 (5th Cir. 1990); *In re Bleaufontaine, Inc.*, 634 F.2d 1383, 1389-1390 (5th Cir. 1981).

20. *In re Gilchrist*, 891 F.2d at 559.

21. 796 F.2d 994 (7th Cir. 1986).

22. See *American Grain Association v. Lee-Vac, Ltd.*, 630 F.2d 245, 247-248 (5th Cir. 1980); *In re Bleaufontaine, Inc.*, 634 F.2d at 1389.

II. THERE IS NO SPLIT IN THE CIRCUITS REGARDING APPLICATION OF § 363(m)

Petitioner claims that there is a split in the circuits regarding application of 11 U.S.C. § 363(m). As revealed by a careful reading of Petitioner's own Petition, as well as the relevant case law, this is inaccurate.

In *In re Gilchrist* and *In re Sax*, the Fifth and Seventh Circuits hold that in the context of a bankruptcy sale, under 11 U.S.C. § 363(m), when a property is sold to a good faith purchaser and there is no stay pending appeal, an appeal challenging the sale is moot, and the court does not need to reach jurisdictional issues raised by Petitioner.

There is no split in the Circuits on this issue. The Circuit Courts have consistently held that 11 U.S.C. § 363(m) protects an authorized sale from later modification on appeal, where the purchaser acted in good faith and the sale was not stayed pending appeal.[23]

The Circuit Courts have consistently held that the protection of § 363(m) applies whether the order of sale is challenged on jurisdictional or other grounds.[24]

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23. *See In re Rickel Home Centers, Inc.*, 209 F.3d 252 (3d Cir. 2000); *Pittsburgh Food & Beverage v. Ranallo*, 112 F.3d 645 (3d Cir. 1997); *In re Gucci*, 126 F.3d 380 (2d Cir. 1997); *In re CGI Industries, Inc.*, 27 F.3d 296 (7th Cir. 1994); *In re Gilchrist*, 891 F.2d 559 (5th Cir. 1990); *In re Stadium Management Corp.*, 895 F.2d 845 (1st Cir. 1990); *In re Onouli-Kona Land. Co.*, 846 F.2d 1170 (9th Cir. 1988); *In re Sax*, 796 F.2d 994 (7th Cir. 1986); *In re Bleaufontaine, Inc.*, 634 F.2d 1383 (5th Cir. 1981).

24. *Pittsburgh Food & Beverage v. Ranallo*, 112 F.3d 645, 650 (3d Cir. 1997); *In re Gilchrist*, 891 F.2d 559, 560-561 (5th Cir. 1990); *In re Sax*, 796 F.2d 994, 997-998 (7th Cir. 1986).

Petitioner argues that application of 11 U.S.C. § 363(m) has resulted in an "absolute mootness" doctrine that ignores this Court's general Article III mootness analysis as set forth in *Mills v. Green*,[25] and reiterated in *Church of Scientology of California v. United States*.[26]. That is incorrect. These cases merely set forth the general proposition that where circumstances change during the course of an appeal, through no fault of the defendant, such that it is no longer possible for the Court to grant effective relief to the plaintiff, it is proper to dismiss the appeal as moot.[27] On the other hand, if effective relief can still be granted, the appeal is not moot.[28]

Petitioner's argument reveals a misunderstanding of both 11 U.S.C. § 363(m) and the rationale behind it. Petitioner characterizes it as an "absolute mootness" rule.[29] In application, however, it is not an absolute mootness rule. Other courts have referred to § 363(m) as a "bankruptcy mootness rule" or a "statutory mootness" provision.[30] The latter is probably the most accurate label. Whatever terminology is used, however, it is consistently recognized that the rule developed from two principles: (1) the general rule, as set forth in *Mills v. Green* and *Church of Scientology*, that the occurrence of events which prevent an appellate court from granting effective relief renders an appeal moot; and (2) the specific need for finality in bankruptcy coupled with the need to protect the interest of a

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25. 159 U.S. 651, 16 S. Ct. 132 (1895).

26. 506 U.S. 9, 113 S. Ct. 447 (1992).

27. *Mills v. Green*, 159 U.S. at 653, 16 S. Ct. at 133.

28. *Church of Scientology*, 506 U.S. at 13, 113 S. Ct. at 450.

29. *See In re Filtercorp, Inc.*, 163 F.3d 570, 576 (9th Cir. 1998).

30. *In re Onouli-Kona Land Co.*, 846 F.2d at 1171-1172; *In re Rickel Home Centers, Inc.*, 209 F.3d at 298.

good faith purchaser.[31] Essentially, once property is sold to a good faith purchaser, the appellate court can no longer render effective relief because to disturb the sale would require affecting the rights of a good faith purchaser.

In application, 11 U.S.C. § 363(m) is not an "absolute mootness" rule because there are specific criteria which are necessary before the rule will be applied. There must be an order of sale by the Bankruptcy Court, the order of sale must not have been stayed pending appeal, the sale at issue must have closed, and the purchaser must be a good faith purchaser.

Moreover, in practice, the Courts have consistently recognized an exception to the statutory mootness rule specifically where the appellant seeks relief that does not affect the validity of the sale. Petitioner cites the cases of *In re Osborn*, (10th Cir. 1997),[32] *In re BCD Corp.*, (10th Cir. 1997),[33] and *In re Lloyd*, (7th Cir. 1994)[34] as reflecting a "split in the Circuits" regarding application of 11 U.S.C. § 363(m).[35] In fact, however, these cases only deal with the exception to application of 11 U.S.C. § 363(m) where the validity of the sale is not being contested.

In *In re Osborn*, the debtor claimed a homestead exemption on certain property. The exemption was denied, and the Debtor appealed the order denying the exemption. Meanwhile, the

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31. *In re Onouli-Kona Land Co.*, 846 F.2d at 1172; *Pittsburgh Food & Beverage*, 112 F.3d at 647-648; *In re CGI Industries*, 27 F.3d at 299; *In re Stadium Management Corp.*, 895 F.2d at 847.

32. 24 F.3d 1199 (10th Cir. 1997).

33. 119 F.3d 852 (10th Cir. 1997).

34. 37 F.3d 271 (7th Cir. 1994).

35. Pet. at 16.

property was sold by the trustee. Although the property had been sold, the Tenth Circuit held that the Debtor's appeal was not moot because the court could still grant to the Debtor some effective relief if the denial of the homestead exemption was wrong.[36] Section 363(m) did not bar the appeal because the Debtor did not seek to affect the validity of a sale to a good faith purchaser.[37] Because a ruling in the Debtor's favor could entitle him to an interest in the proceeds of the sale of his homestead, the appeal was not moot.[38]

In re BCD Corporation[39] is in accord with *In re Osborn*. In *In re BCD Corporation*, an initial sale of the Debtor's property to the highest bidder was set aside, and the property was resold to a third party. On appeal, the sale to the third party was not at issue. The original bidder claimed that the bankruptcy court's initial order setting the sale aside was improper, while the Debtor claimed that the appeal was moot because the property had been resold. Under *In re Osborn*, the Tenth Circuit found that the appeal was not moot because, if successful, the appellant might be entitled to an interest in the sale proceeds.[40]

The case of *In re Lloyd* comes out of the same circuit as *In re Sax* and is in no way inconsistent with the ruling in *In re Sax*. Similar to *In re Osborn*, the case of *In re Lloyd* dealt with a denial of the Debtor's claimed homestead exemption and subsequent sale of the property. The Debtor appealed from the denial of the homestead exemption. Applying 11 U.S.C. § 363(m), the Seventh Circuit held that the Debtor

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36. *In re Osborn*, 24 F.3d at 1203.

37. *Id.*. at 1203-1204.

38. *Id.* at 1204.

39. 119 F.3d 852 (10th Cir. 1997).

40. *In re BCD Corporation*, 119 F.3d at 856-857.

could not challenge the sale itself. The property had been sold to a good faith purchaser, and the sale would not be overturned. However, because the Debtor also claimed an interest in the proceeds of the sale, the Court held that the appeal was not entirely moot.[41]

Petitioner argues that *In re Onouli-Kona Land Co.*, (9th Cir. 1988)[42] and *In re Filtercorp, Inc.*, (9th Cir. 1998)[43] apply an absolute mootness analysis which ignores the general Article III mootness analysis set forth in *Mills v. Green* and *Church of Scientology of California v. United States*. Petitioner's argument fails to grasp the fact that the rule set forth in 11 U.S.C. § 363(m) is actually based upon that very same Article III mootness analysis; i.e., when there is a change of events during the course of an appeal that prevents an appellate court from granting effective relief, the appeal becomes moot.

In re Onouli-Kona Land Co. does not ignore the principles set forth in *Mills v. Green* and *Church of Scientology*, nor is it in conflict with *In re Osborn*; *In re BCD Corp.*, or *In re Lloyd.* In *In re Onouli-Kona Land Co.*, the Debtor sought to overturn a sale of property sold at foreclosure by arguing for an exception to § 363(m) where the creditor/purchaser is a party to the appeal. The Court found no justification for such an exception. The Court noted, however, that it did honor one exception to the bankruptcy mootness rule, based upon its ability to fashion relief, where the property is sold to a party/creditor and the foreclosure sale is subject to a statutory right of redemption.[44]

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41. *In re Lloyd*, 37 F.3d at 273.

42. 846 F.2d 1170 (9th Cir. 1988).

43. 163 F.3d 570 (9th Cir. 1998).

44. *In re Onouli-Kona Land Co.*, 846 F.2d at 1172-1175.

In re Filtercorp is also not in conflict with *In re Osborn*; *In re BCD Corp.*, or *In re Lloyd*, or with *Mills v. Green* and *Church of Scientology*. In *In re Filtercorp*, appellant argued that § 363(m) should not apply, claiming that the court could fashion effective relief. Once again, the Court found no basis for an exception to the bankruptcy mootness rule because the relief sought by the appellant would result in undoing the sale.[45]

Despite Petitioner's claims, there is no split in the circuits regarding application of 11 U.S.C. § 363(m), nor was application of § 363(m) in the present case in any way offensive to this Court's general Article III mootness analysis.

III. PETITIONER IS NOT ENTITLED TO AFFECT THE VALIDITY OF THE SALE

Pursuant to 11 U.S.C. § 363(m), Petitioner is not entitled to obtain any relief on appeal which would affect the validity of the sale. Petitioner argues that this appeal is not moot because he does not seek recovery of the land but an interest in the sale proceeds. He implies that he does not seek to overturn the validity of the sale, but any such implication is misleading at best.

In the present appeal, there is no issue regarding Petitioner's interest in the sales proceeds. Petitioner's arguments on appeal are all presented based upon his status as a beneficiary of the two grantor trusts. Under the Final Judgment, the Debtor's interest in the sales proceeds was placed into the Debtor's Net Proceeds Account. Distributions will be made from that account to creditors, including Fergus Ginther, pursuant to the Plan of Reorganization which was just confirmed by Order entered May 10, 2001. If Petitioner has a complaint about the manner in

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45. *In re Filtercorp*, 163 F.3d at 577.

which the proceeds are being distributed, he can appeal confirmation of the Plan, which he has indicated he will do.[46]

As far as Petitioner's dispute regarding the record title interest of Nucorp, Inc., Petitioner did not raise that issue as part of this appeal in either the District Court or Court of Appeals below. The Final Judgment recognizes Nucorp, Inc. as a 9.375% record title holder. It further specifically states that the Final Judgment does not have res judicata effect on Fergus Ginther's state law claims against Nucorp which he was pursuing at the time of trial, but that the Final Judgment is a final order of sale regarding the property regardless of the outcome of Fergus Ginther's state law claims against Nucorp.[47] Petitioner did not appeal these findings.

Petitioner refers to two requested remedies: an order dismissing the bankruptcy case for lack of subject matter jurisdiction, and an order overturning the Final Judgment. This would certainly affect the validity of the sale. His request is clarified by the relief he requested in his Brief to the Fifth Circuit. He asked the Court to reverse the Final Judgment and remand the case to the Bankruptcy Court with instructions that the case be dismissed and that any property[48] of the Debtor be returned to the trustee of the Ginther Revocable Trust. In the alternative, he asked that the Final Judgment be modified to reflect the imposition of a constructive trust on a 12.86% undivided interest in the land (not the sales proceeds) sold to Redstone pursuant to the Final Judgment.[49] Either of these

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46. Pet. at 14.

47. Pet. App. E at 36a-37a.

48. It is not clear if "property" was intended to refer to sales proceeds only or the real property itself.

49. Brief for Appellants (5th Cir.) at 12, 25-26.

remedies, overturning the Final Judgment, or ordering a constructive trust on the property, affects the validity of the sale.

It is further clear that Petitioner indirectly attempts to reopen the issue regarding the good faith of Redstone. The Bankruptcy Court held Redstone to be a good faith purchaser.[50] On appeal to the District Court, Petitioner attempted to raise an issue regarding Redstone's status as a good faith purchaser. The Fifth Circuit found that Petitioner could not challenge Redstone's status as a good faith purchaser on appeal because Petitioner failed to raise the issue in the trial court.[51] Yet, Petitioner continues to argue to this Court that "the purchaser's good faith is unresolved."[52]

IV. APPLICATION OF 11 U.S.C. § 363(m) DOES NOT PERVERT THE RULE IN *RUHRGAS* AND *STEEL CO.*

Petitioner argues that application of 11 U.S.C. § 363(m) in this case somehow perverts the rule set forth by this Court in *Ruhrgas v. Marathon Oil Co.*[53] and *Steel Co. v. Citizens for a Better Environment.*[54] Petitioner's argument is unfounded.

Ruhrgas has little application to the case at issue. *Ruhrgas* was a non-bankruptcy case involving state-law tort claims. The issue on appeal was, in a case removed from state to federal court, whether a district court abused its discretion by addressing a straightforward issue of personal jurisdiction without first ruling on a more complex and novel issue of subject matter

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50. Pet. App. E at 25a; Resp. App. B at 6a, 10a-11a, 16a.

51. Pet. App. A at 5a.

52. Pet. at 28.

53. 526 U.S. 574, 119 S. Ct. 1563 (1999).

54. 523 U.S. 83, 118 S. Ct. 1003 (1998).

jurisdiction. The Court found that the District Court did not abuse its discretion in addressing personal jurisdiction without first ruling on the issue of subject matter jurisdiction.[55]

Steel Company v. Citizens for a Better Environment also has little application to the present case. The issue was whether a certain statute authorized suits for past violations of the statute, and whether the plaintiff had standing to bring the suit. This Court determined that it should address the jurisdictional issue first. Because the Court found that none of the relief requested by the plaintiff would remedy its claimed injury, the plaintiff was held to have no standing to bring the suit.[56] As part of its analysis, the Court declined to endorse a practice used by several Courts of Appeal, referred to as "hypothetical jurisdiction", whereby the Court would address a merits question prior to a jurisdictional issue if the merits question was more readily resolved and the prevailing party on the merits would be the same as the prevailing party were jurisdiction denied.[57]

The Fifth Circuit's findings in this case do not pervert the rule in either *Ruhrgas* or *Steel Co.* As noted by Petitioner, unquestionably, a federal court has the power to dismiss a case for mootness without reaching the issue of subject matter jurisdiction.[58] The Fifth Circuit's application of § 363(m), which dictates that a bankruptcy sale shall not be reversed whenever the purchaser acts in good faith and the sale is not stayed pending appeal, is a proper exercise of that power.

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55. *Ruhrgas*, 526 U.S. at 588, 1119 S. Ct. at 1572.

56. *Steel Co.*, 523 U.S. at 109-110, 118 S. Ct. at 1020.

57. *Steel Co.*, 523 U.S. at 94, 118 S. Ct. at 1012.

58. Pet. at 13.

V. APPLICATION OF 11 U.S.C. § 363(m) DOES NOT IN ANY WAY CONFLICT WITH THE REMEDY OF VACATUR

Petitioner argues that application of 11 U.S.C. § 363(m) somehow conflicts with the remedy of vacatur. Vacatur, however, is not at issue in this case, nor does the remedy of vacatur conflict with application of 11 U.S.C. § 363(m).

Under 28 U.S.C. § 2106, the Supreme Court or any other court of appellate jurisdiction may affirm, modify, vacate, set aside or reverse any judgment brought for review from a court below. Vacatur of a judgment below is considered an extraordinary equitable remedy. It is employed when a controversy presented for review becomes moot due to circumstances not attributable to any of the parties. In that situation, a party can request the appellate court to vacate the judgment below in order to prevent a judgment below, which was never fully reviewed, from having preclusive or res judicata effect. *U.S. Bancorp Mortgage Co. v. Bonner Mall Partnership*;[59] *United States v. Munsingwear*.[60]

Vacatur has no application here. It is a remedy applied when the circumstances justify vacating a judgment below, which is unreviewable because of mootness, so that it no longer has legal consequences. The principle behind 11 U.S.C. § 363(m) is entirely different. Under § 363(m), once the bankruptcy court authorizes a sale and the sale closes, absent a stay, the appeal becomes moot because by statute the validity of the sale must remain intact. Overturning the order which authorized the sale in the first place would by its very nature affect the validity of the sale.

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59. 513 U.S. 18, 115 S. Ct. 386 (1994).

60. 340 U.S. 36, 71 S. Ct. 104 (1950).

VI. PETITIONER'S JURISDICTIONAL ARGUMENTS ARE MISGUIDED

The crux of Petitioner's argument is that 11 U.S.C. § 363(m) should not be applied when there is an issue of subject matter jurisdiction. Petitioner's argument, however, that the Bankruptcy Court lacked subject matter jurisdiction is misguided. The issue raised by the Motion to Dismiss was really a question as to the Debtor's eligibility to file bankruptcy, not a question of subject matter jurisdiction.

Bankruptcy courts clearly have jurisdiction of all cases under Title 11; of all civil proceedings arising under Title 11, or arising in or related to cases under Title 11; and of all property of the debtor and property of the estate. 28 U.S.C. §§ 1334(a), (b), and (e); 28 U.S.C. § 157. A bankruptcy court clearly has the ability to determine who is eligible to be a Debtor under 11 U.S.C. § 109. Whether an entity qualifies as a debtor under § 109 is a question of eligibility and not of subject matter jurisdiction.[61]

Moreover, a bankruptcy court clearly has jurisdiction to determine what constitutes property of the debtor's estate. One of the fundamental functions of the Bankruptcy Court is to determine property of the bankruptcy estate. In fact, the Bankruptcy Court has exclusive jurisdiction over determinations as to what is property of the estate.[62]

The issue of the Debtor's eligibility to file bankruptcy under 11 U.S.C. § 109 was addressed by the Bankruptcy Court. Just like Petitioner, the creditors argued that the Debtor really consisted of a trust or trusts, and that trusts do not fall within the definition of "person" as used in 11 U.S.C. § 109 and as defined by 11 U.S.C. § 101(41). After a multi-day evidentiary

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61. *Matter of Phillips*, 844 F.2d 230, 235-236 n.2 (5th Cir. 1988).

62. *In re Ascher*, 128 B.R. 639, 643 (Bankr. N.D. Ill. 1991).

hearing, the Bankruptcy Court entered an Order wherein it found that the Debtor was a de facto joint venture composed of two grantor trusts, which did qualify as a debtor under Chapter 11, and that the only property of the estate was the real estate known as the "El Dorado Ranch" and the Debtor's interest in the El Dorado Golf Club, Inc.[63] No appeal was taken from that Order.

The June 24, 1998 Order was a final order in that it determined what property was property of the Debtor's estate.[64] In determining the eligibility of the Debtor, as a joint venture, to qualify as a Debtor under Chapter 11, and further determining what constituted property of the Debtor's estate, the Order was final with respect to a "single jurisdictional unit," and resolved a "discrete unit in the larger case."[65]

Petitioner has not filed an appeal from the June 24, 1998 Order, nor did he provide either the District Court or the Fifth Circuit below with the record of the hearing on the Motion to Dismiss. The factual basis for Judge Greendyke's decision that the two grantor trusts operated as a de facto joint venture and that their 51% interest in the Ranch is property of the estate is not included in the record on appeal. As noted in *In re Sax*, a bankruptcy court always has jurisdiction to determine if it has jurisdiction. That decision stands unless it is appealed properly.[66] Despite the general rule that subject matter jurisdiction can be raised at any time, "valid procedural rules cannot be ignored

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63. Resp. App. A.

64. *Matter of Greene Hospital*, 835 F.2d 589, 595 (5th Cir. 1988), *cert. denied*, 488 U.S. 820 (1988); *T&B Scottsdale Contractors, Inc. v. U.S.*, 866 F.2d 1372 (11th Cir. 1989), *cert. denied*, 493 U.S. 846 (1989). *See also Matter of Simpson*, 36 F.3d 450, 452 (5th Cir. 1994); *In re Moody*, 817 F.2d 365, 368 (5th Cir. 1987).

65. *Matter of Greene Hospital*, 835 F.2d at 593-594.

66. *In re Sax*, 796 F.2d at 998.

just because the jurisdictional decision is being challenged rather than the decision on the merits."[67] Through this appeal, Appellants attempt an improper collateral attack on an Order which was entered almost three years ago. At trial, Judge Greendyke clearly considered the Order to be a final order, and the time for appeal to have lapsed. As he said, Appellants' argument that there was no Debtor and no property of the estate was "water under the bridge".[68]

The basis for Petitioner's jurisdictional argument is also unfounded. Petitioner argues that there is no joint venture. He appears to say that there cannot be a joint venture because there are not two or more persons to form the venture. This argument is disingenuous.

The Fifth Amended and Restated Revocable Trust Agreement referred to by Petitioner, following the death of the first Grantor, actually provides for creation of two trusts — the "surviving Grantor's Trust" and the "deceased Grantor's Trust".[69] It gives the Trustee of those trusts the power to enter into any transaction on behalf of any trust even if the other party to the transaction is a trust under the Trust Agreement, and it gives the Trustee the power to continue any business, including a partnership.

Petitioner further argues that trusts are not legal entities and are not persons with capacity to enter into partnerships.[70] That is inaccurate. As noted by Petitioner, Article 6132b-2.02 of the Texas Revised Partnership Act provides that "an association of two or more persons to carry on a business

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67. *In re Sax*, 796 F.2d at 998.

68. Resp. App. B at 5a-7a.

69. Pet. App. L at 62a.

70. Pet. at 27.

for profit as owners creates a partnership" whether the association is called a "partnership" or a "joint venture". Article 6132b-1.01(14) defines "person" to include "an individual, corporation, business trust, estate, trust, custodian, trustee, executor, administrator, . . ." Thus, by the terms of the statute, a partnership in Texas can consist of two or more trusts.

VII. EQUITABLE AND PRACTICAL CONSIDERATIONS FURTHER DICTATE THAT THIS APPEAL IS MOOT

Even beyond consideration of § 363(m), as a practical matter, the Court cannot undo the sale at this point. Effective judicial relief is no longer available. As such, this appeal is moot.

Petitioner's request to overturn the Final Judgment and undo the sale would have far-reaching consequences not only to Redstone but also to a large number of additional persons who are not parties to this appeal. In reviewing the order of sale, this Court is allowed to consider both the equitable and practical considerations of undoing the sale.[71] Undoing the sale at this point is virtually impossible. Relying on the sale order's finality, Redstone has conveyed almost half of the surface estate (767.75 out of 1643.94 acres) to an unrelated third party, North Belt/767, L.P., and conveyed the minerals on the same acreage to an unrelated third party, Mesa Road Partners, both of whom are not parties to this appeal. On the property itself, a golf course and a residential development have been commenced and substantial sums of money spent in development of these projects. The title company has distributed all of the sales proceeds. As part of the closing of the sale, past taxes due and owing on the Ranch property, as well as closing costs, were paid out of the sales proceeds. The remaining proceeds were

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71. *Matter of Manges*, 29 F.3d 1034, 1042-1043 (5th Cir. 1994), *cert. denied*, 513 U.S. 1152, 115 S. Ct. 1105 (1995).

distributed pro rata to the Debtor (via the Debtor Net Proceeds Account) and the co-interest owners. Persons who held a lien against a co-owner's interest (including Petitioner who had a judgment lien) were paid before the co-interest owner was paid. Thus, millions of dollars have already been distributed to lienholders and co-interest owners, who (except for Petitioner, Redstone and the Debtor) are not parties to the appeal. As reflected by Redstone's List of Parties, there are numerous parties who are not parties to this appeal who would be affected by a reversal of the sale order. From an equitable standpoint, the effect of undoing the sale is not only virtually impossible, but would have a disastrous financial impact on the Debtor, the Debtor's creditors, the co-interest owners, their lienholders, Redstone, North Belt/767, L.P. and Mesa Road Partners. At this point, it is impossible to recoup the sales proceeds that have already been distributed to taxing authorities, co-interest owners, lienholders, and other entities who are not parties to this appeal. The Debtor would have no funding for its plan of reorganization which has been approved, its creditors would have no way of getting paid, and the co-interest owners (who either supported or did not object to the sale) would be stuck with their respective undivided interests in a property which would be greatly reduced in value. As such, both the District Court and the Fifth Circuit were correct in finding this appeal moot.

As stated by Judge Greendyke, sale of the Ranch to Redstone was in the best interest of all parties:

> **Greendyke:** I think inescapable from everything I've heard, from all the witnesses and I think it's apparent from watching the demeanor of the parties and looking at these ancient, almost twenty-year old court proceedings between the parties who are here today, I think the best thing for that 2,000 acres is to go ahead and clean it up by selling free and clear of

all these claims and interests to somebody who will do something with it besides fight over it.[72]

CONCLUSION

The only real issue before this Court is whether the Fifth Circuit properly affirmed the District Court Order's granting Debtor's and Redstone's Motion to Dismiss the Appeal as moot. Due to the fact that the sale has occurred, that Petitioner was not successful in obtaining a stay pending appeal, and that Redstone was a good faith purchaser, this appeal is moot and the Fifth Circuit was correct in affirming the Order of the District Court. This case raises no significant issue that warrants this Court's review, and Redstone respectfully requests that this Honorable Court deny the Petition.

Respectfully submitted,

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72. Resp. App. B at 7a.